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Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,
Petitioners,

against

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

Interest of the *Amicus*

The granting of certiorari in this case brings into question the constitutional validity of state immunity statutes. These statutes—such as the one under attack in the instant case—provide for appropriate sanctions where an individual refuses to testify before a state investigative body despite having been granted immunity, pursuant to

such a statute, from state criminal prosecution based upon matter elicited through his testimony.

The immunity statutes have come into being as the states have sought to respect the privileges against self-incrimination contained in their own constitutions, statutes and common law,* while still maintaining their responsibilities for law enforcement. Every one of the fifty states has such statutes on its books,** and these play a vitally important role in the states' efforts to investigate crime and to enforce their own criminal laws.

The statutes are frequently employed by grand juries, legislative committees, and special crime investigating commissions. By granting a single individual immunity from prosecution, state investigative bodies have been able to obtain valuable information leading to the conviction of others—information which would otherwise be extremely difficult, if not impossible, to obtain. See, *e.g.*, Brief of the National District Attorneys' Association, *Amicus Curiae*, in the instant case, pp. 5-14. Even when it does not lead directly to the conviction of others, such information can be a valuable guide to legislators, as well as to law enforcement officials, in their efforts to combat crime.

A reversal of the convictions in the instant case—at least if made on the ground that the immunity conferred on petitioners was insufficient because it did not protect them from possible incrimination under federal law—

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* The privilege against self-incrimination is included expressly in the constitutions of every state except Iowa and New Jersey. Iowa considers the privilege as within the scope of its due process clause (see *Amana Society* v. *Selzer*, 250 Iowa 380, 383-84, 94 N. W. 2d 337, 339 [1959]), while the privilege is provided for by statute in New Jersey (N.J.S.A. 2A:81-5; *State* v. *White*, 27 N. J. 158, 168-69, 142 A. 2d 65, 70 [1958]). See 8 Wigmore, EVIDENCE § 2252 (McNaughton rev. 1961).

** An exhaustive list of immunity statutes is set forth in 8 Wigmore, EVIDENCE § 2281 n 11 (McNaughton rev. 1961).

could very well mean that, as a practical matter, the states would be deprived of a very valuable means of investigating and protecting against criminal activity.

Concerned over the viability of state immunity statutes, and convinced that the protection against self incrimination afforded by the Fifth Amendment of the Constitution will not be infringed by an affirmance of the convictions in this case, we file this brief in support of respondents, pursuant to Rule 42 of the Rules of this Court.

Statement of the Case

Petitioners Murphy and Moody seek reversal of their convictions for civil contempt. The convictions resulted from petitioners' refusal, on October 27, 1961, to testify before the Waterfront Commission of New York Harbor —despite having been granted immunity, pursuant to N.J.S.A. 32:23-86(5), against prosecution in the States of New York and New Jersey concerning any transaction to which they would testify—on the ground that their answers might tend to incriminate them (R. 58-83). In particular, petitioners refused to answer the questions propounded to them on the ground that the Commission's grant of immunity could not protect them from federal prosecution (R. 58, 59, 72).

Upon petitioners' refusal to answer the questions despite the grant of immunity, the Waterfront Commission instituted contempt proceedings against them in the Superior Court of New Jersey, Hudson County. That Court, in judgments filed December 4, 1961, found petitioners guilty of both criminal and civil contempt, fined them $50 and sentenced them to 30 days in jail, and further ordered that they remain incarcerated until they answered certain questions listed in the judgments (R. 176-183). On appeal, the Supreme Court of New Jersey, in an opinion by Judge Proctor dated March 4, 1963, unani-

mously affirmed the convictions for civil contempt, but reversed the convictions for criminal contempt on the ground that the lower court should have given petitioners the opportunity to present evidence on the question of intent to commit a criminal contempt (R. 213, 239-40; reported at 39 N. J. 436, 189 A. 2d 36 [1963]). Certiorari was granted by this Court on October 14, 1963 (375 U. S. 812).

Statutes and Constitutional Provisions Involved

The Fifth Amendment of the United States Constitution provides that:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The immunity statute involved, N.J.S.A. 32:23-86(5), is a subdivision of an interstate compact known as the Waterfront Commission Act, which was originally entered into by the States of New York and New Jersey in 1953, with the consent of Congress.* The immunity subdivision was enacted in 1956 in New Jersey (L. 1956, c. 194) and in 1957 in New York (L. 1957, c. 188), pursuant to provisions of the original compact which authorized the Legislature of either State, when concurred in by the other, to enact amendments and supplements to the compact.** The statute is modeled after § 2447 of the New York Penal Law, and is typical of many state immunity statutes. Its text is set forth in full in the Appendix to this brief.

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* 67 Stat. 541, Act of Aug. 12, 1953, c. 407. The compact is codified in N.J.S.A. 32:23-1 *et seq.* and in McKinney's Unconsolidated Laws of N. Y. §§9801 *et seq.* The compact created the Waterfront Commission as an agency of both states, with power to regulate labor and hiring practices on the waterfront in the Port of New York Harbor. The Commission is empowered to investigate waterfront practices and other matters bearing on the compact's objective of eliminating evil conditions on the waterfront of the Harbor. See the opinion of the Court below, R. 213, 222-26.

** See N.J.S.A. 32:23-70.

Questions Presented

While additional issues have been raised in the briefs of the parties, our concern as *amicus* is with the validity of state immunity statutes. Consequently, we confine our discussion to the following question:

> May an individual be punished for contempt for refusing to testify before a state investigating body, on grounds of possible self-incrimination under federal law, despite having been granted immunity from state prosecution?

In answering this question in the affirmative, we consider particularly the following three questions:

1. Assuming that use in a federal court of evidence obtained pursuant to a grant of state immunity would violate an individual's privilege against self-incrimination, are adequate means available to the federal courts to protect against the use of such evidence?

2. Assuming that the Fifth Amendment privilege against self-incrimination extends to the states through the Fourteenth Amendment, does the privilege include a right to refuse to testify in a state inquiry as to matters which might be incriminating under the laws of a different sovereignty, particularly where prosecution in the other sovereignty on the basis of such evidence is an extremely remote possibility?

3. Do the circumstances of this particular case—in which the assertion of a right to refuse to testify in a state proceeding, solely on grounds of possible federal prosecution, must be balanced against the extreme remoteness of the possibility of federal prosecution based on such testimony (or its "fruits") and against strong public interests in the prevention of crime and

the maintenance of a federal system of government in which the states are primarily responsible for criminal law enforcement—show a violation of due process?

Summary of Argument

I

The particular problem posed is that of possible prosecution under federal law, on the basis of information obtained pursuant to a state grant of immunity from prosecution. The problem is, however, more illusory than real—such evidence is rarely, if ever, used by a federal prosecutor, and in any event it is clearly within the power of the federal courts to prevent the use of state-compelled testimony, or its "fruits", in a federal criminal proceeding.

In only one case—*Feldman* v. *United States*, 322 U. S. 487, decided twenty years ago (1944)—did this Court permit the use of such evidence in a federal prosecution. It is apparent from the absence of challenges to federal convictions based on use of such evidence, despite the willingness expressed by four of the present Justices to reexamine the *Feldman* rule, that the *Feldman* decision is simply not availed of by federal prosecutors. Indeed, the rationale of the *Feldman* opinion has been weakened by the Court's abandonment, in the area of federal use of illegally obtained evidence, of the "silver platter" doctrine upon which the *Feldman* opinion relied. *Cf. Elkins* v. *United States*, 364 U. S. 206 (1960). In view of the Court's decisions recognizing the inadmissibility in a federal prosecution of confessions involuntarily adduced, as well as of evidence seized in an illegal search, a federal conviction based upon evidence obtained pursuant to a grant of immunity from state prosecution seems subject to question.

In the event that a federal prosecutor did seek to use an individual's state-compelled testimony, or its "fruits" against him, it would be open to the defendant to move in

the federal court to suppress the evidence prior to trial, or to object to its introduction at the trial. The pre-trial motion to suppress has proven quite adequate to handle problems arising in federal prosecutions where a defendant fears use against him of evidence obtained as the result of an illegal search or wiretap. Surely the same procedure could be equally effective in preventing use of testimony compelled pursuant to a grant of immunity from state prosecution.

It is not necessary to prevent the *production* of testimony in a state proceeding in order to protect against its *use* in a federal prosecution—a federal right of protection from use of self-incriminating state-compelled testimony can be quite adequately protected simply by refusing to permit use of such testimony, or its "fruits", against a defendant in a federal prosecution. Federal law enforcement would not thereby be hindered (since a federal prosecutor would simply be in the same position as if the defendant had never testified in a state proceeding), and the state immunity statutes so essential to crime investigation and law enforcement would thereby be preserved.

II

Assuming the privilege against self-incrimination is to be regarded as a fundamental part of due process, binding upon the states (*cf. Malloy* v. *Hogan*, 150 Conn. 520, 187 A. 2d 744 [1963], *cert. granted* 373 U. S. 948 [1963], No. 110, Oct. T. 1963), we are nonetheless concerned in this case with only a peripheral aspect of the privilege—*i.e.*, with the problem of whether the privilege against self-incrimination includes right to refuse to testify as to matters which can only be incriminating under the laws of another sovereignty.

We note that it is only where there is some real and substantial possibility of prosecution of him on the basis testimony sought to be elicited, that an individual's assertion of a privilege against self-incrimination will be sus-

tained. The fact that the only possible prosecution would be under the laws of a different sovereignty is, of course, a factor to be considered in determining the remoteness of the possibility. Particularly where the other sovereignty —here, the federal government—has developed a clear policy against use in its own prosecutions of evidence involuntarily adduced from an individual, there is no reason to recognize the assertion of the privilege.

The fact that the only possibility of prosecution is under the laws of another sovereignty is relevant in another way, too—since the principal justification for the existence of the privilege against self-incrimination is that it helps deter abuses by a government in the enforcement of its own criminal laws, no policy basic to the relation of government and governed would be served by construing the privilege to provide protection against possible prosecution under the laws of another sovereignty.

III

As is the case with any due process claim, petitioners' assertion of a right to refuse to testify in a state inquiry, on the ground of a claimed possibility of incrimination under federal law, must be weighed against competing societal considerations. We note five such considerations which, we submit, militate against holding that due process has been violated in this particular case: (1) the extreme remoteness of the possibility of federal prosecution; (2) the fact that the federal courts could adequately protect against the use of state-compelled testimony, or its "fruits", in the event that a federal prosecutor did seek to use such evidence against an individual; (3) the fact that the sovereignty seeking the testimony cannot possibly convict the individual of any violation of its own laws; (4) a strong public interest in investigating criminal activity and enforcing state criminal laws; and (5) a strong public interest in maintaining a federal system in which the states are primarily responsible for enforcement of the criminal law.

ARGUMENT

POINT I

Assuming that the privilege against self-incrimination would be violated by the use against an individual, in a federal prosecution, of evidence obtained pursuant to a grant to him of state immunity, the states should not be barred from penalizing persons who refuse to testify despite having been granted immunity from state prosecution.

Petitioners' primary contention (Br., pp. 22-28, 34-56) is that their refusal to testify before the Waterfront Commission was justified, notwithstanding the Commission's grant of immunity from state prosecution, because their testimony might subject them to incrimination under federal law.

Petitioners' claimed fear of federal prosecution is asserted on the basis of this Court's decision in *Feldman* v. *United States*, 322 U. S. 487 (1944). There, a federal mail-fraud conviction was affirmed over a contention that the defendant's privilege against self-incrimination was violated by the use of testimony he had given in a state civil proceeding pursuant to statutes granting him immunity from state prosecution for matters revealed in the testimony but requiring him to testify under penalty of a contempt order. The Court's subsequent decisions in *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958), and *Mills* v. *Louisiana*, 360 U. S. 230 (1959), have held that the privilege against self-incrimination is not violated by a state contempt conviction for refusing to testify before a state agency after being granted immunity from state prosecution. Hence, petitioners picture themselves as caught on the horns of a dilemma when called before the Waterfront Commission: they suggest that they could either remain silent and risk

state contempt proceedings, or answer the Commission's questions and risk federal prosecution.

The claimed dilemma, however, is more fanciful than real. Not only is federal prosecution on the basis of such testimony highly unlikely as a practical matter, but the use of both the testimony itself, and its "fruits", can be precluded by the federal courts, if indeed such use would be violative of an individual's constitutional rights.

A. The likelihood of federal prosecution or conviction on the basis of evidence obtained through a state grant of immunity is extremely remote.

The fact that petitioners fail to cite a single post-*Feldman* decision in which state-compelled testimony has been used as a basis for federal prosecution is significant as indicating that their professed fear of such prosecution is unfounded. Although the *Feldman* case is on the books, there is absolutely no indication—either in the record before this Court or in the cases decided since 1944—that federal prosecutors do attempt to introduce against a defendant evidence obtained as a result of immunity granted him from state prosecution. It appears that such evidence simply is not used to obtain federal convictions—quite possibly because of a belief on the part of federal prosecutors that such convictions would be subject to challenge. Despite the fact that *Feldman* itself was decided by only a 4-3 vote, and that four Justices of the present Court—enough to grant certiorari—have expressed their willingness to re-examine that decision,* there have been no

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* Concurring opinions of Mr. Justice BRENNAN in *Knapp* v. *Schweitzer*, 357 U. S. 371 (1957) at 381-82 and *Mills* v. *Louisiana*, 360 U. S. 230 (1958) at 230-31; dissenting opinions in the same cases of Mr. Chief Justice WARREN, 357 U. S. at 381-82 and 360 U. S. at 231-39; Mr. Justice BLACK, 357 U. S. at 382-85 and 360 U. S. at 236-39; and Mr. Justice DOUGLAS, 357 U. S. at 382-85 and 360 U. S. at 236-39.

challenges to federal convictions based on such evidence which have reached this Court in the twenty years which have since elapsed.*

Particularly in view of this Court's holding in *Elkins* v. *United States*, 364 U. S. 206 (1960), a defendant facing federal prosecution and fearing the use against him of testimony previously elicited from him under a grant of state immunity (or the "fruits" of such testimony) could be expected to proceed by a motion prior to trial to quash the indictment or to suppress such evidence, or by objection to its admission at the federal trial. Indeed, it is at least arguable that the *Elkins* decision—putting an end to the "silver platter" doctrine under which evidence obtained through illegal search and seizure solely by state officers had been admissible in federal prosecutions—has overruled *Feldman* sub silentio. See *Elkins* v. *United States*, 364 U. S. 206, 210 (1960). The majority opinion in *Feldman*, which relied heavily on the now-abandoned silver platter doctrine (see 321 U. S. 487, 492-94), must be appraised in the light of the more recent decisions of this Court recognizing the inadmissibility in federal prosecutions of coerced confessions (see *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 347-48 [1963]) and illegally obtained evidence (see *Elkins* v. *United States, supra*). See also *Bram* v. *United States*, 168 U. S. 532, 542-43 (1897); *Wan* v. *United States*, 266 U. S. 1, 14-15 (1924). The posture of the cases would appear to render remote and highly improbable a federal conviction based upon evidence obtained pursuant to a grant of immunity from state prosecution. The time to deal with the problem of use of such evidence in a federal prosecution is when and

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* In fact, our "Shepardizing" of *Feldman* v. *United States*, 322 U. S. 487 (1944), fails to reveal a single reported case in which a federal conviction has been challenged on appeal on grounds of use of evidence obtained as a result of a state grant of immunity.

if a federal prosecutor attempts to make use of it. *Cf. Poe* v. *Ullman*, 367 U. S. 497, 507-09 (opinion of Mr. Justice FRANKFURTER, concurring opinion [at 509] of Mr. Justice BRENNAN) (1961).

B. Adequate means are available to the federal courts to prevent use against an individual, in a federal prosecution, of evidence obtained through state-compelled testimony. It is not necessary, therefore, to invalidate state immunity statutes.

Petitioners suggest (Br., pp. 26-27, 44-48), citing the Chief Justice's dissent in *Mills* v. *Louisiana*, 360 U. S. 230, 235-36 (1958), that even a direct overruling of *Feldman* would not protect against use of the "fruits" of state-compelled testimony, as opposed to use of the testimony itself, in a federal prosecution. This suggestion, however, ignores the practical possibilities available to a defendant to guard against the use of such evidence.

Either a motion to suppress the evidence prior to trial (*cf.* Fed. R. Crim. Proc. 41 [e]; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 278 [1936]), or an objection to its introduction at trial (*cf. Brown* v. *Mississippi*, 297 U. S. 278 [1936]) should suffice to protect against infringement of an individual's right not to testify against himself. To the extent that use of the "fruits" of state-compelled testimony might amount to a violation of constitutional rights, the individual would be adequately protected by the "fruit of the poisonous tree" doctrine availed of in wiretap and search and seizure cases (*cf. Nardone* v. *United States*, 308 U. S. 338, 341 [1939]; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 [1919]).*

* It should be noted that this would not hinder federal law enforcement at all—if evidence obtained as a result of a defendant's prior testimony under state grant of immunity were to be secured from use against him in a federal trial, the federal prosecutor would be in the same position as if the defendant had never testified at the state proceeding at all. Information independently obtained could, of course, be used against the defendant at a federal trial, regardless of any prior state testimony under grant of immunity.

In the *Nardone* case, the Court suggested a practical way for federal courts to handle the problem of possible use against a defendant of information obtained as a result of illicit wiretapping in violation of § 605 of the Communications Act of 1934 (308 U. S. at 341):

> "A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

Without conceding that the "tree" itself is poisonous where it consists of testimony lawfully obtained pursuant to a grant of immunity from state prosecution, we submit that this suggested procedure would very adequately protect against use of state-compelled testimony in the federal courts.* Indeed, just such a procedure has already been employed by at least one experienced federal judge where, in denying a pre-trial motion to suppress such evidence, he

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* Petitioners themselves implicitly acknowledge the feasibility of such a procedure. In their brief (pp. 50-52), they object to the Superior's Court's refusal of their requests for discovery on the question of federal-state cooperation. We submit that the Superior Court was clearly correct in refusing these requests, but that such a procedure would be very much in order in a federal court where petitioners had actually been indicted and had reason to fear that their state-compelled testimony, or its fruits, might be used against them in the federal prosecution. Our point is simply that in seeking such discovery in the state court—as in now attacking their contempt convictions on the basis of a highly speculative possibility of federal prosecution—these petitioners ask the courts to act prematurely.

noted that the Government did not intend to put to the jury any statement made by any defendant under a grant of state immunity; that the Government had denied getting any information from the state-compelled testimony that it did not already have from independent sources; and that nothing to the contrary had been shown. (See *United States* v. *Bonanno*, 178 F. Supp. 62, 68 n. 13 (S.D.N.Y. 1959) (KAUFMAN, J.).

Mr. Justice DOUGLAS points out, in his dissenting opinion in *Mills* v. *Louisiana*, 360 U. S. 230, 236, 238-39 (1958), that if evidence obtained from an individual pursuant to a state grant of immunity were barred from use against him in a federal proceeding, protection of a federal right against self-incrimination could be left to the federal courts. We submit, however, that it does not at all follow that, because the *Feldman* case happens to be on the books, the only or appropriate way to protect against such use is to prevent the production of testimony, in a state proceeding, pursuant to a grant of state immunity. Clearly, any federal right against self-incrimination would be fully protected simply by refusal to permit the introduction of such evidence at a federal criminal trial. And, if such evidence cannot be used against an individual in a federal prosecution, there is no reason to prevent the states from requiring him to testify—once granted immunity from state prosecution, his testimony could not incriminate him under either state or federal law.

No federal right is left unprotected by permitting the states to compel such testimony under pain of a contempt order. Assuming the existence of a federal right to be free from incrimination on the basis of one's own testimony under grant of state immunity, that right can be adequately protected without overruling the *Knapp* and *Mills* decisions—but an overruling of *Knapp* and *Mills* would strike a crippling blow at the states' efforts to investigate criminal activity and to enforce and improve their criminal laws.

POINT II

Even assuming that the Fifth Amendment privilege against self-incrimination extends to the states through the Fourteenth Amendment, one who is granted immunity in a state inquiry may not refuse to testify as to matters which might incriminate him under the laws of a different sovereignty, particularly where there is only a very remote possibility of the other sovereignity using his testimony against him.

Assuming that the right of an individual not to be a witness against himself is to be regarded as a fundamental part of due process, binding upon the states (*cf. Malloy* v. *Hogan*, 150 Conn. 520, 187 A. 2d 744 [1963], *cert. granted*, 373 U. S. 948 [1963], No. 110, Oct. T. 1963), we can conceive of four situations in which this constitutional right might be asserted by an individual:

(1) As a defendant in a federal prosecution, when incriminating information obtained through his own prior involuntary disclosures is sought to be introduced into evidence against him.

(2) As a witness in a federal proceeding—criminal, civil, judicial, investigative or administrative—when he is requested to give testimony which might tend to incriminate him.

(3) As a witness in a state proceeding, when he is requested to give testimony which might tend to incriminate him.

(4) As a defendant in a state prosecution, when incriminating information obtained through his own prior involuntary disclosures is sought to be used against him.

In situations (1) and (4) the constitutional right would be asserted to protect against the *use* against the individual of information obtained through the individual's own

involuntary disclosures regardless of where made. In situations (2) and (3), the right would be asserted to protect against the *production* of testimony which could be used to incriminate the individual—under the laws of the same or of a different sovereignty. Our immediate concern is with one aspect of the third type of situation—i.e., assuming that an individual has a "fundamental right", assertable in a state proceeding, to refuse to answer a question on the ground that his answer might tend to incriminate him, does that right include a further right to refuse to testify as to matters which could only be incriminating under the laws of another sovereignty? We urge (A) that there is no warrant for recognizing the hypothesized further right where the possibility of prosecution under the laws of another sovereignty is remote or non-existent; and (B) that even where there is some substantial possibility of such prosecution, the policy underlying the privilege against self-incrimination is inconsistent with its use as a shield from possible incrimination under the laws of another sovereignty.

A. A privilege against self-incrimination should not be recognized where the person claiming its protection faces only a remote possibility of prosecution on the basis of the testimony sought to be elicited from him.

In those situations where testimony is sought to be elicited from an individual, it is only the possibility of its ultimate use against him which can conceivably sustain his refusal to testify. If there is no actual likelihood of prosecution on the basis of the testimony (or its "fruits"), then the right to exercise a privilege against self-incrimination will not be recognized in either federal or state courts. See, *e.g.*, *Mason* v. *United States*, 244 U. S. 362, 365-66 (1917); *Hoffman* v. *United States*, 341 U. S. 477, 486 (1951); *In re Pillo*, 11 N. J. 8, 19, 93 A. 2d 176, 181-82 (1952); and see 8 Wigmore, Evidence § 2272 (McNaughton rev. 1961).

Thus, for example, an American citizen having no contacts with a foreign nation could scarcely be heard to argue that a danger of incrimination under the laws of another nation could justify him in refusing to testify in either a federal or state proceeding. Similarly, a witness in a federal proceeding who has been granted immunity pursuant to a federal statute providing that his testimony can not be used against him in any proceeding in any court is foreclosed from refusing to testify on grounds of possible incrimination under state law—the federal immunity statute protects him against prosecution under either federal or state law. *United States* v. *Ullmann*, 350 U. S. 422, 434-36 (1956); *Brown* v. *Walker*, 161 U. S. 591, 606-08 (1896).

Even state courts which have held that a privilege against self-incrimination can be asserted to protect against the possibility of prosecution under the laws of another sovereignty have recognized that the danger of such prosecution must be real and substantial. Compare *People* v. *Den Uyl*, 318 Mich. 645, 29 N. W. 2d 284 (1947), and *State* v. *Dominquez*, 228 La. 284, 82 So. 2d 12 (1955), with *In re Watson*, 293 Mich. 263, 284-85, 291 N. W. 652, 661 (1940), and *State* v. *Ford*, 233 La. 992, 1014, 99 So. 2d 320, 327 (1958). Decisions of this Court have also noted the remoteness of a possibility of prosecution in another sovereignty as a reason for rejecting claims that the privilege against self-incrimination should protect against a refusal to testify in the proceedings of the forum. *Cf. Brown* v. *Walker*, 161 U. S. 591, 608 (1896); *Jack* v. *Kansas*, 199 U. S. 372, 382 (1905); *Hale* v. *Henkel*, 201 U. S. 43, 68-69 (1906).

As we have demonstrated in Point I, there is as a practical matter no real danger of use against an individual, in a federal prosecution, of evidence obtained pursuant to a state grant of immunity even under the present state of the law. Assuming that the privilege against self-in-

crimination is to be regarded as a fundamental part of due process, surely this Court would not permit the use of information obtained through an individual's involuntary testimony to be used against him in the federal courts. This alone is sufficient reason for declining to recognize these petitioners' attempted assertion of a right to refuse to testify despite having been granted immunity from state prosecution.

B. Since the purpose of the privilege against self-incrimination is to deter abuses by a government in the enforcement of its own criminal laws, it should not be construed to provide protection against possible prosecution under the laws of another sovereignty.

Even if there were any real possibility of federal prosecution (or of prosecution under the laws of another state) on the basis of testimony adduced pursuant to a state immunity statute, a right to refuse to testify in a state proceeding on grounds of possible self-incrimination (assuming the existence of such a right as a fundamental part of due process) should not protect against the possibility of incrimination under the laws of another sovereignty. Both the policy behind the privilege, and the case law on the subject, support this view.

While as many as a dozen reasons have been advanced to justify the existence of the privilege against self-incrimination (*cf.* 8 Wigmore, EVIDENCE § 2251 [McNaughton rev. 1961]), we submit that the fundamental policy behind the rule is that of protecting against abuses potentially incident to the enforcement by a government of its criminal laws—*i.e.*, of regulating the relations of government and the governed. As Professor McNaughton has noted, this policy of regulating the government-governed relation really has two aspects: it helps to prevent inhumane treatment of persons from whom information is desired, and it helps satisfy popular sentiment that, "when omnipotent government arrays its forces against solitary

governed in mortal combat, the government may in nowise conscript the governed to its aid." McNaughton, *Self-Incrimination Under Foreign Law*, 45 Va. L. Rev. 1299, 1308 (1959); and see 8 Wigmore, EVIDENCE §§ 2251, 2258 (McNaughton rev. 1961).

Viewed in this perspective, as a restraint against the overbearance of a government upon its governed, the privilege against self-incrimination simply has no relevance in situations where crimes against the sovereignty seeking the testimony are not involved. This view of the privilege, as a deterrent against abuses by a government in seeking to prove violations of its own criminal laws, is supported by the past decisions of this Court, and by an overwhelming majority of state court decisions.*

There are two decisions of this Court—*United States* v. *Saline Bank*, 26 U. S. (1 Pet.) 100 (1828), and *Ballman* v. *Fagin*, 200 U. S. 186 (1906)—which have been interpreted in some quarters as supporting the view that the privilege against self-incrimination protects a witness against compulsory disclosure of matters self-incriminating under the laws of another sovereignty. (See, *e.g.*, Kroner, *Self-Incrimination: The External Reach of the Privilege*, 60 Col. L. Rev. 816, 818-19 [1960].) Such a view, however, is clearly inconsistent with the decisions of the Court which have held squarely that the privilege does not protect a witness against self-incrimination under the laws of another sovereignty, and that statutes granting a witness immunity from prosecution under the laws of the forum for matters elicited in testimony are constitutional because they give a witness protection equivalent to the privilege. Moreover, it is anything but clear from a reading of the *Saline Bank* and *Ballman* v. *Fagin* decisions that they support the view that the privilege extends to self-incrimination under the laws of another sovereignty.

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* See 8 Wigmore, EVIDENCE § 2258 n. 6 (McNaughton rev. 1961), for a compilation of the state cases.

United States v. *Saline Bank*, 26 U. S. (1 Pet.) 100 (1828), was a civil suit pursuant to which a bill for discovery was filed in the United States District Court for the Western District of Virginia against stockholders of a Virginia bank. A plea in bar to the bill was sustained in a one paragraph decision by Chief Justice MARSHALL, which noted that (26 U. S. [1 Pet.] at 104):

> "This is a bill in equity for a discovery and relief. The defendant set up a plea in bar, alleging that the discovery would subject them to penalties, under the statute of Virginia. . . . It is apparent, that in every step of the suit, the facts required to be discovered in support of this suit should expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it."

The decision does not mention the privilege against self-incrimination at all, and clearly should not be read as standing for the proposition that the privilege protects against prosecution under the laws of another sovereignty. On the contrary, it would appear that the *Saline Bank* decision was merely a reassertion of the long-established equity principle that equity will not aid in a forfeiture. See *United States* v. *Hutcheson*, 369 U. S. 599, 608 n. 13 (1962); 8 *Wigmore*, EVIDENCE § 2250, n. 92 and accompanying text and § 2258, n. 6 [McNaughton rev. 1961]).

In *Ballman* v. *Fagin*, 200 U. S. 186 (1906), the Court upheld the assertion of the privilege against self-incrimination in a case where an individual had been convicted of contempt and imprisoned for refusing to produce a certain book before a federal grand jury. The decision noted that the production of the book would very possibly have disclosed matters incriminating under federal law, as well as furnished evidence in a pending state criminal prosecution. 200 U. S. at 195-96.

The most that can be said for *Ballman* v. *Fagin* is that it raised a possibility that the federal privilege against

self-incrimination could be invoked when criminal proceedings in another sovereignty were pending and the danger of self-incrimination was real and substantial. Clearly, however, the possibility of incrimination under the laws of another sovereignty was not necessary to the decision in *Ballman*, in view of the real possibility of incrimination under federal law.

Other Supreme Court cases decided during the same term as *Ballman* seem to rely on two grounds for refusing to recognize the assertion of a privilege against self-incrimination made on the basis of possible prosecution under the laws of a different sovereignty—the remoteness of the possibility of foreign prosecution and the principle that the privilege protects only against prosecution under the law of the forum state. See *Jack* v. *Kansas*, 199 U. S. 372 (1905) and *Hale* v. *Henkel*, 201 U. S. 43 (1906).

The remoteness of a possibility of state prosecution was not discussed at all, however, in *United States* v. *Murdock*, 284 U. S. 141 (1931), a case in which an individual based his refusal to testify in a federal proceeding solely upon grounds of self-incrimination under state law. The claim was rejected in an unanimous decision, in which the rule was stated simply (284 U. S. at 149):

> "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

The lower federal courts have consistently followed the *Murdock* rule in cases where fear of subsequent state prosecution has been claimed as a ground for assertion of the privilege against self-incrimination in federal proceedings. See *Tedesco* v. *United States*, 255 F. 2d 35 (6th Cir. 1958); *Marcello* v. *United States*, 196 F. 2d 437 (5th Cir. 1952). The *Murdock* holding has, of course, been recently reaffirmed in the opinions of this Court in *Knapp*

v. *Schweitzer*, 357 U. S. 371 (1957) and *Mills* v. *Louisiana*, 360 U. S. 230 (1958), where contentions identical to those raised by petitioners in this case were rejected by the Court.

POINT III

The Fifth Amendment privilege against self-incrimination should not be regarded as a fundamental and absolute right to refuse to respond to orderly State inquiry, at least where the State is not seeking to enforce its own criminal laws against the individual whose testimony it requests.

This Court has on a number of occasions stated that the Fifth Amendment privilege against self-incrimination confers rights which can be asserted only in federal proceedings. See, *e.g.*, *Twining* v. *New Jersey*, 211 U. S. 78, 110-114 (1908); *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934); *Palko* v. *Connecticut*, 302 U. S. 319, 323-24 (1937); *Adamson* v. *California*, 332 U. S. 46, 51 (1947); *Knapp* v. *Schweitzer*, 357 U. S. 371, 374 (1957).

There are, we suggest, two principal reasons why the privilege against self-incrimination has thus far been treated by the Court in a somewhat different fashion than the protections afforded by the First, Fourth and Sixth Amendments. *First*, the contexts in which problems involving assertion of the privilege against self-incrimination in state proceedings have come before the Court have not been conducive to a finding that the state action complained of amounted to a deprivation of due process. *Second*, the Court has implicitly recognized that in every case where the privilege is asserted, there are competing considerations to be weighed: the individual's interest in not being forced to convict himself out of his own mouth, and the societal interest in not permitting government to convict its subjects on their own involuntary testimony, must be balanced against the actual possibility of harm to the individual, and against strong public interests in the

investigation of crime, the enforcement of state criminal laws and the maintenance of a viable federal system of government.

As with every due process claim, a claim based upon the constitutional protection against self-incrimination must be considered in the circumstances of the particular case. Particularly in the case of the privilege against self-incrimination, which can be asserted in so many different kinds of situations, the competing considerations will inevitably vary in importance from case to case.

Thus, where a defendant in a state prosecution has remained silent throughout his trial, it has been held that the prosecutor's comment upon inferences which might be drawn from such silence did not violate due process (*Twining* v. *New Jersey*, 211 U. S. 78 [1908]; *Adamson* v. *California*, 332 U. S. 46 [1947]), although such comment is impermissible in a federal prosecution (*cf. Bruno* v. *United States*, 308 U. S. 287 [1939]; *Smith* v. *United States*, 268 F. 2d 416 [9th Cir. 1959]). And, while the coerced confession cases indicate that there are undoubtedly instances where testimonial compulsion by a state violates fundamental concepts of fairness (see, *e.g. Rogers* v. *Richmond*, 365 U. S. 534 [1961]; *Haynes* v. *Washington*, 373 U. S. 503 [1963]), it is clearly not every state compulsion of testimony that offends due process. For example, it is well established that—even in a federal proceeding—an individual's assertion of the privilege against self-incrimination will not exonerate him from answering a question unless he has reasonable cause to apprehend danger from a direct answer. See *Mason* v. *United States*, 244 U. S. 362, 365-66 (1917); *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Emspak* v. *United States*, 349 U. S. 190, 206 (1955).

As the foregoing cases demonstrate, the Fifth Amendment privilege against self-incrimination cannot be regarded simply an absolute and unqualified right to silence regardless of the circumstances in which it is as-

serted. Even the rights to freedom of speech, of the press, or the free exercise of religion, and of peaceable assembly, are qualified to some extent—they may be limited by other legitimate interests of the society in certain kinds of situations. *Cf. Schenck* v. *United States*, 249 U. S. 47, 52 (1919); *Gitlow* v. *New York*, 268 U. S. 652, 666-68 (majority opinion of Mr. Justice SANFORD), 672-73 (dissenting opinion of Mr. Justice HOLMES) (1925); *Bridges* v. *California*, 314 U. S. 263 (majority opinion of Mr. Justice BLACK) (1941); *Uphaus* v. *Wyman*, 360 U. S. 72, 81 (majority opinion of Mr. Justice CLARK), 82, 106 (dissenting opinion of Mr. Justice BRENNAN) (1959); *Hamilton* v. *Regents*, 293 U. S. 245, 265-68 (concurring opinion of Mr. Justice CARDOZO) (1934); *West Virginia State Board of Education* v. *Barnett*, 319 U. S. 624, 639 (1943); *Richter* v. *United States*, 181 F. 2d 591 (9th Cir. 1950), cert. denied 340 U. S. 892 (1950).

Not every aspect of a "fundamental right" deserves equal consideration. Freedom to express one's political beliefs at a peaceable assembly, for example, is hardly to be equated with freedom to shout "fire" in a crowded theater. *Cf. Schenck* v. *United States*, 249 U. S. 47, 52 (1919). Similarly, the core of the Fifth Amendment privilege against self-incrimination—the right not to be a witness against oneself, in the most literal sense—ought not to be equated with a claimed right to refuse to testify in a state proceeding solely on grounds of possible self-incrimination under federal law. The latter claim is of a right which would be far indeed from the core of the bundle of rights contained in the Fifth Amendment's privilege against self-incrimination. In such a case, the weight accorded to competing societal considerations must necessarily be greater.

Against the right asserted in the case at bar must be balanced at least the following considerations: (1) the fact that the actual possibility of prosecution in the federal courts, on the basis of testimony as to which the privilege is asserted, is remote or non-existent; (2) the fact that federal prosecution on the basis of such testimony (or its "fruits") can be adequately protected against by the federal courts, without destroying state immunity statutes,

when and if the now highly speculative possibility of federal prosecution becomes a reality; (3) the fact that the sovereignty seeking to elicit petitioners' testimony cannot possibly use it to convict petitioners under its own laws; (4) a strong public interest in investigating criminal activity and enforcing state criminal laws, which would be grievously hurt by a denial to the states of the power to compel testimony by granting immunity from state prosecution; and (5) a strong public interest in maintaining a viable federal system in which the states remain primarily responsible for enforcement of the criminal law (*cf. Abbate v. United States*, 359 U. S. 187, 195 [1959]).

CONCLUSION

The judgment of the Supreme Court of New Jersey —sustaining petitioners' convictions of civil contempt for refusing to testify in a State inquiry, on grounds of possible incrimination under Federal statutes, despite having been granted immunity from State prosecution—should be affirmed.

Dated: New York, New York, February 25, 1964.

Respectfully submitted,

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APPENDIX

The immunity statute involved in this case, N.J.S.A. 32:23-86 (5), provides that the Waterfront Commission of New York Harbor shall have the power:

> "To confer immunity, in the following manner: in any investigation, interview or other proceeding conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the state of New York or the state of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.
>
> " 'Immunity' as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding.

But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

" 'Immunity' shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."